U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 30Oct2001

CASE NO.: 2001-LHC-139

OWCP NO.: 01-149375

IN THE MATTER OF

JAMES D. CHATELL,
Claimant

v.

ELECTRIC BOAT CORP.,
Employer

and

NATIONAL EMPLOYERS COMPANY,
Carrier

APPEARANCES:

Scott Roberts, Esq.,
For the Claimant

Conrad Cutcliffe, Esq.
For the Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq*., brought by James Chatell (Claimant) against Electric Boat Corporation

(Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on May 15, 2001 in New London, Connecticut.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced eight exhibits, which were admitted, including: an LS-203 with correspondence to the Department of Labor; medical records from Dr. Vincent MacAndrew (MacAndrew); General Dynamics dispensary records; non invasive vascular studies by Dr. Guy Lancellotti (Lancellotti); medical records from Gate Orthopedics; Drs. Richard T. Leach (Leach); Richard A. Reuter (Reuter); and a deposition of Dr. MacAndrew. Employer called one witness, a workers compensation specialist, Jeanne McDonagh and introduced twenty-four exhibits, which were admitted, including: Employee's Claim for Compensation; Employer's First Report of Injury; Notice of Controversion; Amended Pre-hearing Statement; medical reports from Drs. Leach; Lancellotti; MacAndrew; West Bay Orthopaedic; Robert Galluchi; Martin Karno; Reuter; plus various payment records; report of King Vocational Associates; and a resume of Cherie L. King.

Post-hearing briefs were filed by the parties. Employer also filed a pre-hearing brief. Based upon the stipulations of the parties, the evidence introduced, my observation of the witnesses' demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was employed by Employer up until June 10, 1995.

2. Claimant advised employer of an injury to his right knee on March 30, 2000.

3. Employer filed a Notice of Controversion on September 11, 2000.

4. An informal conference was held on September 6, 2000.

5. Claimant's average weekly wage at the time of the alleged injury was $584.98 with a corresponding compensation rate of $ 389.99.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Timely Notice of Injury.

2. Causation.

3. Nature and Extent of Injury and Date of Maximum Medical Improvement.

4. Section 3(e) credit.

5. Interest and Attorney Fees.

III. STATEMENT OF THE CASE

A. Chronology

Claimant worked for Employer at the Quonset Point facility in Rhode Island, from 1976 to 1979, and again from 1980 to 1995, in the construction of submarines. (Tr. 31).[1] Prior to 1976, Claimant worked for Valley Ready Mix, a concrete company, as a general laborer. (Tr. 30). During his eight to ten years at Valley Ready Mix, Claimant never sustained an injury other than minor cuts and scrapes. (Tr. 30-31). From 1976 to 1979, Claimant worked for Employer as a structural welder, constructing frames for the inside of a submarine hull. (Tr. 32-33). This job involved repetitious climbing, crawling, stooping, bending and grinding. (Tr. 35). During this period Claimant never complained of any work related injuries. (Tr. 33). In 1979, Claimant left Employer and returned to work for Valley Ready Mix because he was offered a higher hourly wage. (Tr. 31). Shortly after, however, Valley Ready Mix laid Claimant off, and Clamant returned to work for Employer resuming his old job as a structural welder. (Tr. 34).

While working for Employer in 1980, Claimant sustained an injury to his heel when he jumped off a laydown - a platform elevated about three feet off the ground on which the submarine frame is built. (Tr. 33, 39). In relation to that injury, and a subsequent aggravation in 1992, Claimant received compensation under State and Federal Workers' Compensation Laws. In 1983, Claimant received $3,931.20 for loss

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[1] The following abbreviations are used throughout the decision: Br. - Brief; CX - Claimant's Exhibit; Dep. - Deposition; EX - Employer's Exhibit; Tr. - Hearing Transcript.

of use of each lower extremity and $4,500 for disfigurement to each lower extremity under the laws of Rhode Island. In 1993, under the Act, Claimant received Section 8 permanent partial disability for each lower extremity totaling $7,558.97, and State benefits for disfigurement of the left lower extremity totaling $2,700.00. (Tr. 74-75; EX 15-16; E. Pre-Hearing Br. at 10).

Unable to handle the physical requirements of a structural welder, especially considering the multitude of operations Claimant had on his feet from 1980 to 1987, Employer placed Claimant on "light duty" within the structural welding department. (Tr. 35 - 37). Inevitably, Claimant was asked to do tasks that entailed standing on his feet for long hours and was asked to climb ladders. (Tr. 35). Unable to effectively perform these tasks, Claimant moved to the Transportation Department. (Tr. 35). In the Transportation Department Claimant was able to stay off of his feet, as that job consisted of operating heavy equipment, driving tractor trailers, forklifts, and delivering gas bottles. (Tr. 35).

After two or three years in Transportation, Employer experienced cutbacks, and Claimant was laid-off from the Transportation Department, but, was moved into the pipe welding shop. (Tr. 37-38). Pipe welding was easier than structural welding because the pipe welders were in a heated shop, had their own table and did not have to stand up all day. (Tr. 38). After approximately four years, Claimant was laid-off again and transferred back to his original job as a structural welder. (Tr. 38). This time, however, Claimant was put to work in a different building, containing sixty-foot cylinders, standing upright, constituting the "round part" of the submarine. (Tr. 40-41). Welding consisted of climbing inside, around and on top of the cylinders, at heights of up to sixty feet, using ladders and crawling on two-by-ten boards. (Tr. 40, 43-45). Claimant worked in this area from around 1993 until he was laid off on June 10, 1995. (Tr. 43). At the time of his departure, Claimant was earning an hourly wage of $14.69. (Tr. 72; EX 1).

During his time with Employer, Claimant never went to the company dispensary to report the problems with his knee. In October of 1994, however, Claimant visited with Dr. Leach complaining of numbness in his legs and related that he was having trouble walking long distances. (Tr. 63; EX 6). Claimant finally settled his claim with Employer regarding his 1980 injury to his heels on December 18, 1995, receiving a net settlement check of $68,000.00. (Tr. 48; EX 18, 20-22). Shortly after being laid-off, on November 2, 1995, Claimant saw Dr. MacAndrew complaining of right knee pain and that he experienced "locking and popping [when] climbing stairs." (EX 8). On November 28, 1995, after examining a MRI of Claimant's knee, Dr. MacAndrew stated that Claimant had an old ACL tear, a degenerative tear in the right knee with attenuation of the MCL. *Id*. Also, Dr. MacAndrew thought there might be a lateral tear and he stated that Claimant had a degenerative cyst of the medial femoral condyle. *Id*. Dr. MacAndrew's report further stated that Claimant's pain had been ongoing for the past two years with symptoms getting worse over the past six months. *Id*. In April 1996, Dr. MacAndrew also diagnoses osteoarthritis. (MacAndrew Dep. 8). In response to a letter by Claimant's attorney, on August 14, 2000, Dr. MacAndrew opined that the injury was not work related. (MacAndrew Dep. 35-36).

Around January of 1996, Dr. MacAndrew performed orthoscopic surgery, totally replacing Claimant's right knee. (Tr. 50). Claimant paid for this surgery through his personal insurance carrier and did not think of the injury as work related until he spoke with his attorney in March of 2000. (Tr. 76, 80).

In the latter part of 1996, Dr. MacAndrew approved Claimant for some type of work and Claimant found employment at Hills Lumber Yard, which lasted less than one day, because he ruptured a muscle in his arm after pulling on a sheet of plasterboard. (Tr. 52). Claimant reported the injury and quit, but, did not seek Workers' Compensation for that injury even though it required minor surgery. (Tr. 53). Claimant also was employed by Bellknapp White driving a truck for about a week and a half. (Tr. 69). Claimant stopped working there because the combination of knee and heel injuries prohibited him from climbing on the back of the truck. (Tr. 70). On January 15, 1997, Claimant found new employment with Lightship Group as a machinist. (Tr. 54). That job entails maintenance and mechanic work on lathes and bridgeports, and requires Claimant to drive a truck. (Tr. 54). On May 15, 2001, the date of the hearing, Claimant was still employed by Lightship Group and testified that he is physically able to perform the work. (Tr. 54). When Claimant began working for Lightship Group he earned $11.00 an hour, and through annual raises, this amount had increased to $17.00 an hour in 2001. (Tr. 72).

B. Claimant's Testimony

Claimant recounted his work history, facts of his injuries, and the medical treatment received for those injuries. After injuring his heels in 1980, Claimant went back to his old job as a structural welder. (Tr. 35). Claimant testified that he could no longer handle this job because it involved climbing, crawling, stooping and grinding. (Tr. 35). Even with "light duty" restrictions Claimant was still asked to climb, and his difficulties led to his move into the Transportation Department. (Tr. 35). The purpose of that move was to keep Claimant off his feet, and Claimant testified that he was physically able to perform the transportation job. (Tr. 35, 37). Similarly, Claimant testified that he was physically able to perform in the pipe welding shop because the floor was covered with thick rubber mats, the building was heated and he did not have to stand up all day. (Tr. 38). The heated work area was especially important to Claimant because "it kept the dampness out of [his] feet and out of [his] legs and out of [his] back." (Tr. 38). Without a heated environment Claimant testified that the dampness and the cold settled into the back of his legs which caused his feet to ache. (Tr. 40). Claimant testified that his physical problems re-appeared when he was transferred back to a job as a structural welder in the unheated building containing the cylinders. (Tr. 44).

Furthermore, Claimant testified that his "light duty" restrictions were not effective when he transferred out of the pipe welding shop into the cylinder welding facility. (Tr. 44). Despite the fact that Claimant told his supervisors that he was not supposed to climb because he had bad feet, the nature of the work required him to climb up to sixty feet off the floor every day. (Tr. 44). Claimant testified the climbing was especially dangerous for him because he could not feel on the bottoms of his feet which meant that he could not feel where he was stepping. (Tr. 45). In addition to climbing, Claimant also related that he had to crawl, on his knees, across two-by-ten boards to weld inside the cylinder. (Tr. 45). These activities, which took place in an unheated bay, made Claimant's legs tender and caused burning sensations, as well as soreness and numbness. (Tr. 46). Claimant was reluctant to seek help from the dispensary because a Dr. Hays had released him, telling him that he had reached maximum medical improvement, with regard

to his heel injury, and that there was nothing else that he could do for Claimant. (Tr. 47). Claimant did visit a foot doctor, who operated on Claimant twice. (Tr. 47).

About one year prior to his final lay-off with Employer, Claimant began to notice pain in his legs that he had not previously experienced in connection with his heel injury. (Tr. 64). Claimant never reported his symptoms to the Employer's dispensary because he did not associate the pain with his knees, rather, he believed that it was merely an affliction stemming from his feet, and Claimant was told that there was nothing more that a doctor could do for his feet. (Tr. 65). Alternatively, Claimant associated the pain with arthritis or just old age. (Tr. 80). After leaving Employer, Claimant testified that his knee was bothering him to such an extent that he sought medical attention from his family doctor, Dr. Leach, who referred him to Dr. MacAndrew. (Tr. 49).

After Claimant complained of aching, burning, soreness and stiffness, Dr. MacAndrew performed orthoscopic surgery and ended up replacing Claimants knee because Claimant's knee "was bone on bone. It was just totally worn out." (Tr. 50). Still Claimant did not relate this injury to his employment stating that he did not remember receiving any injury to his knee other than normal wear and tear. (Tr. 56). Also, since Claimant did not work for Employer any longer, Claimant did not think that he could have Employer's workers' compensation carrier pay for the operation. (Tr. 84). Accordingly, Claimant paid for the operation using his personal health insurance. (Tr. 66). Furthermore, Claimant testified that he could never return to work for Employer because he cannot kneel on his replacement knee, cannot climb ladders and has a difficult time climbing stairs. (Tr. 57).

Additionally, Claimant testified that the injury he received while working at Hills Lumber Yard was due to his bad knee. (Tr. 52). When Claimant picked up a piece of plasterboard, his leg "buckled out from under" him and that caused a muscle in his arm to rupture. (Tr. 52). Even at his present employment, Claimant has difficulty getting up from the floor, and when he does his knee will crack and sometimes will "lock up." (Tr. 57). Claimant's knee also affects his personal life, restricting his ability to take walks, do yard work, kneel in the garden, push a wheelbarrow, and prohibits him from standing on his leg for lengthy periods of time. (Tr. 59).

C. Deposition Testimony of Dr. MacAndrew

Dr. MacAndrew, a board certified orthopedic surgeon, first saw Claimant as a referral in November of 1995 to investigate complaints of right-sided knee pain. (Dep. 3-4). An MRI revealed an old ACL tear, degenerative changes to the right knee, attenuation of the MCL, a question of a lateral meniscal tear, and degenerative changes to the medial femoral condyle. (Dep. 5). In April of 1996, Dr. MacAndrew also diagnosed osteroarthritis, more specifically, grade IV chondromalacia. (Dep. 8). Following a total right knee replacement, Claimant's recovery was "amazing," however, Dr. MacAndrew did not think that it was appropriate for Claimant to climb any more ladders. (Dep. 10-11). Dr. Mac Andrew testified that Claimant reached maximum medical improvement on November 7, 1996, the date

of his last examination, assigning a whole person impairment of fifteen percent and a lower extremity impairment of thirty-seven percent. (Dep. 14-15)

When asked the hypothetical question of whether Claimant's work activity - described as light duty work after surgery on his heels, followed by two years as a structural welder in the high bay facility - would contribute, aggravate or accelerate the debilitation or function of Claimant's osteoarthritis, Dr. MacAndrew replied, "Yes." (Dep. 12). Dr. MacAndrew explained that climbing and descending stairs on a repetitive basis could contribute to wear and tear, and coupled with Claimant's multiple foot surgeries, Claimant could have favored his right knee which would also lead to increased wear and tear. (Dep. 12-13).

On cross examination, Dr. MacAndrew stated that he never made a causal relationship determination to Claimant's work because for him it was never an issue since there was no mention that the injury was linked to Claimant's work, (Dep. 21-22), and Dr. MacAndrew had no history or information in his records to link the injury to Claimant's work. (Dep. 36). When asked about the etiology of Claimant's knee injury, Dr. MacAndrew stated that there was no certainty in determining when the injury originally occurred. Regarding the ACL tear, Dr. MacAndrew stated that it could have happened as a child or within three or four weeks prior to the MRI. (Dep. 26-27). Likewise, with respect to Claimant's meniscal tear, the doctor stated that there was no method to telling whether it was old or new. (Dep. 29). Similarly, there was no evidence that the attenuation of the MCL was a new injury. (Dep. 30). Claimant also suffered from grade IV chrondromalacia, the worst grade, for a substantial period of time, ranging from two to five years before the MRI. (Dep. 32). When discussing the etiology of Claimant's osteoarthritis, however, Dr. MacAndrew acknowledged that there was no clear cut etiology, but Claimant's osteoarthritis was not likely degenerative because most of Claimant's complaints were specific to his right knee, whereas degenerative osteoarthritis would affect both knees. (Dep. 9).

In general terms, however, Dr. MacAndrew stated that laborers who do physical work on a repetitive basis put their knee joints through more wear and tear than those who sit behind a desk. (Dep. 40). Dr. MacAndrew further opined that Claimant had a job that was physically demanding and that Claimant was likely to have more arthritic problems. (Dep. 41). When asked if he could make this diagnosis to a reasonable degree of medical certainty, however, Dr. MacAndrew stated that he could not do that because he did not have a complete history, but, climbing sixty feet a day, ten to twenty times a day for ten or twenty years, would contribute to more knee pain than normal. (Dep. 41-42).

D. Testimony of Jeanne McDonagh

Ms. McDonagh, Employer's Workers' Compensation supervisor, was called as a witness for Employer to testify that Employer was prejudiced by the late filed Workers' Compensation Claim by Claimant. Ms. McDonagh has twenty years prior Workers' Compensation experience and fifteen years experience with Rhode Island Workers' Compensation state claims. (Tr. 88). She has only been stationed at the Quonset Point facility since April of 2001, (Tr. 93-94), but, is familiar with Employer's policies as

both a supervisor and an employee. (Tr. 88). Ms. McDonagh testified that it is the policy of Employer that injuries must be reported on the same shift that they occur to the medical dispensary or reported within twenty-four hours by telephone. (Tr. 88-89). Had Claimant given notice of the injury in June of 1995, Employer would have investigated the claim by talking to co-workers, supervisors, and could have looked into the actual duties that Claimant was performing to piece together an exact employment history. (Tr. 89-90). Speaking to co-workers and supervisors helps the Employer determine what Claimant's physical capabilities were, and verify activities prior to the injury. (Tr. 92).

Even though Claimant's Workers' Compensation claim was filed on March 27, 2000, Ms. McDonagh had not attempted to contact any supervisors or co-workers but she had looked at the dispensary records. (Tr. 93). Ms. McDonagh further testified that she could not check personnel records to see who Claimant's co-workers were, even though she had access to those documents. (Tr. 93). Citing a lack of time, Ms. McDonagh related that she had not done any retrospective investigation into the claim. (Tr. 95). Ms. McDonagh did acknowledge, however, that once Employer had a report such as Dr. MacAndrew's recitation that Claimant's condition was not due to his employment, then Employer would probably not investigate any further. (Tr. 99).

Ms. McDonagh further testified that under the laws of Rhode Island, Workers' Compensation is paid according to the upper or lower extremity, and the term lower extremity encompasses the whole leg, and not just the foot. (Tr. 90).

IV. DISCUSSION

A. Contention of the Parties

The parties disagree on whether Employer received sufficient notice of the workplace accident, whether there is a causal relation between Claimant's knee injury and his employment, disagree over the nature and extent of the disability, disagree on the date of maximum medical improvement, and the issue of Section 3(e) credit.

B. Notice and Filing

Under 33 U.S.C. § 912(a) (2000), notice of an injury must be given within thirty days after the injury, or, within thirty days of when the employee should have been aware of a relationship between the injury and the employment. In occupational disease cases, notice must be given within one year after the employee became aware, should have been aware, of a relationship between the employment, the disease and the disability. *Id*. Failure to give such notice may be excused when there is no prejudice to the employer or carrier. 33 U.S.C. § 912(d)(2) (2000). These notice provisions must be read in context with

the limitations set forth in Section 913 relating to the filing of claims. For a traumatic injury, a claim must be filed within one year of the injury, but, this prescriptive period does not begin to run until the employee is aware, or should have been aware, of the relationship between the injury and the employment. 33 U.S.C. § 913(a) (2000). For occupational disease claims, an employee has two years once the employee is aware, or should have been aware, of a relationship between the employment, the disease and the disability. 33 U.S.C. § 912(b)(2) (2000). Failure to file a claim timely is not a bar to suit unless objection to such failure is made at the first hearing[2] in which all parties are given reasonable notice and an opportunity to be heard. 33 U.S.C. § 913(b)(1) (2000). Timeliness of a claim is presumed under Section 20(b), and the burden to show untimeliness is on the employer. *Horton v. General Dynamics Corp.*, 20 BRBS 99 (1987).

B(1) Notice & Prejudice

Claimant's notice to Employer on March 30, 2000, that he suffered a work place injury prior to his termination on June 10, 1995, is not grounds to dismiss Claimant's suit because I find that the Employer

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[2] Employer raised Section 913 defenses in its LS-18 pre-hearing statement, and its amended pre-hearing statement . (EX 5). Employer did not raise a Section 13 defense in its pre-hearing brief, at the hearing, or in its post hearing briefs. Employer did, however, discuss Section 12 notice requirements at length.

Under the Act, Section 12 serves the purpose of alerting the Employer of an impending suit, protecting against fraudulent claims, and encourages prompt investigation. *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 691-92 (9th Cir. 1997). Section 13 serves a purpose of repose that Section 12 does not in that Section 13 settles financial disputes within a specified period of time. *Id*. I note that both Sections are interrelated, and because of this interrelation, Claimant cannot be said to be caught off guard that his claim was not timely. Also, I note that the response to a Section 12 defense is essentially the same as the response to a Section 13 defense. In both cases Claimant can argue that he did not know, or, through the exercise of reasonable diligence, should not have known of a relationship between the injury and the employment.

Accordingly, I find that Employer has not waived its Section 13 defense by failing to address the issue in its pre-hearing brief, at the hearing, and in its post-hearing brief. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1987)(holding ALJ did not err in addressing issues raised in the LS-18 but not argued by the parties). *C.f., Matter of Garfield v. J.C. Nicols Real Estate*, 57 F.3d 662, 667 (8th Cir. 1995)(stating that waiver requires: the existence of a right; actual or constructive knowledge thereof; and an intention to relinquish such right, either express or implied); *Gugliemo v. Scotti & Sons, Inc.*, 58 F.R.D. 413 (W.D. Pa. 1973)(finding that a party can waive a pleaded defense by indicating that such a defense is no longer in the case).

is not prejudiced under Section 912(d)(2). The notice requirement serves to alert the Employer of an impending suit, protect against fraudulent claims, and encourage prompt investigation. *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 691-92 (9th Cir. 1997). *See also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613, 102 S. Ct. 1312, 1216-17, 71 L. Ed. 495 (1982)(stating that the notice requirement serves to appraise the employer of the allegations and helps to confine the issues to be tried and litigated). Employer must provide more than conclusory statements that it was prejudiced. *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 424 (5th Cir. 1989)(finding that employers argument of prejudice, that it had "no opportunity to investigate the claim when it was fresh" was conclusory and not persuasive). A mere allegation of difficulty is insufficient to establish prejudice. *Williams v. Nicole Enterprises*, 21 BRBS 164, 169 (1988)(stating that an employer must show that it would be "unable to investigate some aspect of claimant's claim.").

Ms. McDonagh, Employer's workers' compensation supervisor, testified that Employer was prejudiced by Claimant's notification because "[r]eceiving notice four years late made it more difficult to backtrack and piece together [an] exact employment history." (Tr. 89-90). Ms. McDonagh further testified that her office would have investigated the claim by talking to co-workers and supervisors to put together an employment history and verify Claimant's activities prior to the injury. (Tr. 89-92). Her office would also have obtained a work history by speaking directly to the employee. (Tr. 96). Furthermore, Ms. McDonagh testified that receiving notice in March 2000, impinged upon the Employer's ability to obtain its own medical opinions. (Tr. 99).

I find Ms. McDonagh's statement, that she would not be able to determine who Claimant's co-workers and supervisors were, unpersuasive and insufficient to establish prejudice considering the fact that she has access to personnel records and the Quonset Point facility. (Tr. 93). Also, Claimant's notice of injury was given to Employer on March 30, 2000, and the formal hearing in this matter took place well over a year later on May 15, 2001. Since that time no one has attempted any investigation into Claimant's injury. (Tr. 96). Ms. McDonagh further testified that once the Employer had a report such as Dr. MacAndrews' stating that Claimant's knee condition was not related to his employment, then her office would not have pursued the claim any further. (Tr. 99). Additionally, Claimant's deposition transcript was sent to Employer's counsel and received by Ms. McDonagh. (Tr. 96). Accordingly, Employer has shown that the passage of time would make it more difficult to investigate the claim, but, has failed to show any prejudice warranting dismissal. Thus, for determining timely notice, it is not necessary to ascertain the date that Claimant should have been aware of a relationship between the injury and his employment because Employer has not shown prejudice.

B(2) Section 913's Aware or "Should Have Been Aware" Standard

I find that Claimant has not timely filed a claim for compensation under Section 913 of the Act. The limitations period does not begin to run under Section 913 until the employee is aware of the "full character, extent and impact of the harm done to him." *Abel v. Director, OWCP*, 932 F.2d 819, 821 (9th Cir.

1991)(quotation omitted); *Duluth, Missabe & Iron Range Railway Co. v. Director, OWCP*, 43 F.3d 1206, 1208 (8th Cir. 1994)(same). *See also Ceres Gulf, Inc. v. Director, OWCP*, 111 F.3d 17, 18 (5th Cir. 1997)(stating that prescription runs when the employee knows, or should know, that his condition "interefers with his employment by impairing his capacity to work, and its causal connection with his employment."); *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 134 (6th Cir. 1996)(stating that time begins to run only after the "employee becomes or should become aware that the work-related injury will impair the employee's earning capacity."); *Bath Iron Works v. Galen*, 605 F.2d 583 (1st Cir. 1979)(using same analysis for Section 912). "Experiencing pain after an accident, particularly when that pain does not prevent the employee from working, does not put the employee on notice of a likely impairment of long term earning capacity. *Thompson*, 82 F.3d at 135.

B(2)(i) The Jurisprudence

In the case of *Newport News Shipbuilding and Dry Dock Co. v. Parker*, 935 F.2d 20, 21-22 (4th Cir. 1991), the Fourth Circuit determined that Parker's claim, filed in 1988, was timely even though his traumatic injury occurred in 1962. Parker had injured his knee and was discharged by his doctor with no disability in 1963. *Id*. at 21. Parker's knee pain did not totally abate, and he was treated intermittently until 1978. On March 23, 1978, Parker had an x-ray and his physician explained to him that his pain symptoms were related to his 1962 injury. *Id*. Parker was again released from treatment in 1980. *Id*. On May 13, 1987, Parker returned to a physician who performed arthroscopic surgery and restricted Parker's climbing, walking and bending. *Id*. at 22. In 1988 Parker filed his claim for compensation. *Id*. At a formal hearing an ALJ determined that Parker should have been aware in 1978 "of the seriousness of his injury and the likelihood of loss of wage earning capacity." *Id*. On appeal Parker argued that none of the physicians he consulted anticipated any disability prior to his 1987 surgery, and Parker did not lose time from work until that surgery. *Id*. The Board reversed the ALJ's decision and held that Parker should have known of the likely impairment to his earning capacity in 1987, thus, Parker's 1988 claim was timely. *Id*. The Fourth Circuit affirmed the rationale that the time for filing a claim under Section 13 does not commence until an employee has reason to know that an injury would impair earning capacity, and affirmed the Board's finding that Parker should have been aware in 1987. *Id*. at 27. The Fourth Circuit reasoned that experiencing pain is insufficient as a matter of law to establish an awareness of a likely impairment of earning power. *Id*. Also, in 1978, Parker's physician only suggested that surgery might be required in the future, but later, the physician concluded that Parker's symptoms could be controlled by medication alone. *Id*. Inasmuch as Parker continued to work for nine years after 1978, and the prospect of surgery was not raised until 1987, Parker's claim was timely filed. *Id*.

In *Able v. Director, OWCP*, 932 F.2d 819, 820 (9th Cir. 1991), the Ninth Circuit determined that Able's claim for benefits was timely under Section 13. Able suffered a traumatic knee injury in October, 1980. *Id*. Six months later Able sought medical treatment for his injury. *Id*. Able's knee condition further deteriorated and in March, 1982, a physician told Able to stay home for three weeks and recommended orthopedic surgery. *Id*. In August, 1982, Able filed a claim for compensation, and one month later Able's surgeon opined that his knee problem stemmed from his 1980 employment injury. *Id*. On the doctor's advice, Able retired from longshore work in April of 1983. *Id*. At a formal hearing the ALJ determined

that Able was aware of the causal relationship between the injury and his employment when the accident happened in 1980, and consequently the claim was not timely filed. *Id*. The Board likewise rejected Able's claim and his reasoning that "awareness" can only occur "after a claimant first becomes aware of the full character, extent and impact of the harm." *Id*. The Ninth Circuit, however, accepted Able's definition of "awareness" and determined that Able could not have been fully aware of the character, nature and extent of his injury until March, 1982 when Able's physician recommended that he see an orthopedic surgeon after his knee did not improve after taking time off of work. *Id*. at 822-23.

In *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 132 (6th Cir. 1995), a case of first impression, the Sixth Circuit determined that Thompson timely filed a claim under the Act. Thompson suffered four back injuries at work, occurring in 1972, 1976, 1978 and 1979. *Id*. Each time, however, Thompson returned to work after taking a few weeks off for recuperation, and Thompson worked another three years after his last injury. *Id*. at 133. In January, 1984, Thompson was diagnosed by an orthopedic surgeon as having herniated disks, and he underwent subsequent surgery. *Id*. In June, 1984 Thompson filed a claim under the Act. *Id*. Both the ALJ and the Board determined that the claim was timely. *Id*. Likewise, the Sixth Circuit determined that Thompson did not know the full extent of his impairment until he met with his physician in 1984, thus, his claim filed in June was timely.

In *Ceres Gulf, Inc. v. Director, OWCP*, 111 F.3d 17, 19-20 (5th Cir. 1997), the Fifth Circuit determined that the employee, Fagan, did not timely file a Longshore claim. In 1988 Fagan was struck in the head by a hook, causing dizziness and black-outs. *Id*. at 18. A subsequent CAT scan suggested cerebral hemorrage, which one physician related to a hit on the head, but a neurosurgeon opined that there was not any relation to Fagan's work, rather the hemorrhage was a result of cerebral vascular disease. *Id*. On June 27, 1991 Fagan filed his Longshore claim. *Id*. The Fifth Circuit determined that Fagan had actual knowledge of a relationship between the injury and his employment on March 21, 1989, when Fagan filled out a claim for compensation under the Act that was not properly filed with the OWCP office. *Id*. at 20. Accordingly, the Fifth Circuit rejected the argument that Fagan did not become aware that his injury was work related until he spoke with a physician in July, 1990, who related that his neurological problems were related to a blow in the head and not diabetes. *Id*. at 19.

In *Stark v. Washington Star Co.*, 833 F.2d 1025, 1027 (D.C. Cir. 1987), the court determined that Stark's Longshore claim was not timely filed. Stark sought benefits for respiratory aliments in connection to his twenty-two years of employment as a pressman. *Id*. at 1026. Stark filed his claim in 1980 and the court found substantial evidence to demonstrate that Stark had knowledge of his injury more than one year before he filed. *Id*. At least four years before he filed the claim, Stark believed the air in the pressroom was dangerous, he continually coughed up back substances which he thought was ink, he wore a respirator, in 1975 his doctor related that his working environment was not healthy, and he retired in 1976 for that reason. *Id*. at 1027. Additionally, in 1976, Stark contacted an attorney about his claim, and Stark testified that he did not file a suit earlier because he had not accumulated enough medical expenses. *Id*. In 1975, however, Stark's physician related that he could not establish a definitive link between Stark's

condition and his work environment. *Id*. The court, however, found the above factors sufficient to show that Stark should have been aware of a causal connection more than one year before filing suit. *Id*. at 1028.

B(2)(ii) Application to the Facts

Based on the above jurisprudence, I find that Claimant reasonably should have known of a relationship between the injury and the employment on November 7, 1996, the date Claimant was released from Dr. MacAndrew's care with a replacement knee. On November 28, 1995, Claimant became aware that he had an injury to his knee when Dr. MacAndrew diagnosed Claimant with a ACL tear, a lateral meniscal tear, degenerative changes to the medial femorial condyle, and on April 1, 1996, Dr. MacAndrew diagnosed osteoarthritis. (MacAndrew Dep. 5, 8). When Dr. MacAndrew released Claimant on November 7, 1996, MacAndrew stated that he would have told Claimant not to do physical work because someone with a total knee replacement should not climb ladders, climb stairs, or be in a labor intensive position. *Id*. at 10-11, 37-38. Additionally, Claimant learned of his own limitations first hand, in November and December of 1996, when he attempted to work for Hills Lumber Yard and found that he could not lift heavy objects, and again at Bellknapp White when Claimant learned that he could not climb on and off the back of a truck. (Tr. 52, 70). Furthermore, Claimant testified that he cannot do work that entails kneeling or climbing. (Tr. 57). Thus, by April 1, 1996, Claimant became fully aware of the character of his injury, and by November 7, 1996, Claimant became fully aware of the nature and extent of his injury.

Additionally, Claimant had some degree of actual knowledge that his injury was related to his employment. As early as 1994 Claimant conveyed to a physician that he was experiencing pain in his legs. (EX 6). At one point Claimant testified that he associated the pain in his knees with an earlier work-related injury to his heels. (Tr. 64-65). Other factors indicating that Claimant had some degree of actual knowledge of a relationship between his injury and his employment were that: working conditions were present that could cause the injury; Claimant experienced the pain at work; and Claimant had discussed with Dr. MacAndrew whether his knee condition was related to work, and Dr. MacAndrew replied that "anything is possible." (Tr. 66).

Accordingly, unlike *Parker*, Claimant was released from his doctor with a disability, and Claimant knew of the seriousness of his injury and the likelihood of loss of wage earning capacity after being released.[3] Like, *Able*, and *Paducah*, Claimant became aware of the full character, extent and impact of

[3] Here there is no definite statement by a licensed medical professional that Claimant's physical condition is not work related which would serve to toll prescription. I note that Dr. Leach's 1994 negative diagnosis of peripheral vascular disease is not sufficient to negate causation because Dr. Leach did not correctly diagnose a problem with Claimant's knee. Additionally, Claimant cannot rely on the letter written by Dr. MacAndrew on August 14, 2000 negating the possibility that the injury was work related because Dr. MacAndrew wrote the letter well after Claimant had filed a claim and Dr. MacAndrew personally told

the harm after a diagnosis by his physician. Also, some evidence, although not as overwhelming as in *Ceres Gulf, Inc.*, or *Stark*, shows that Claimant had a degree of actual knowledge that his knee injury was associated with his former employment. Therefore, I find that, by the exercise of reasonable diligence, Claimant should have been aware of a causal relationship[4] on November 7, 1996, the date that Dr. MacAndrew released Claimant from his care, which triggered the running of prescription, making Claimant's suit, filed March 27, 2000, untimely.[5]

Should the Board determine, however, that the affirmative defense of Section 13 was waived, or find that Claimant's suit was timely filed, I shall make alternative findings regarding the remaining issues in this case.

IV. ALTERNATIVE FINDINGS

A. Causation

An employee is aided by the Section 20 presumption that the claim comes within the provisions of the Act unless there is substantial evidence to the contrary. 33 U.S.C. § 920 (2000). All factual doubts must be resolved in favor of the claimant. *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998) (quoting *Brown v. ITT/Contiential Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Under the Administrative

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Claimant that the injury might have been related to his employment.

[4] I also note that Claimant possessed a sufficient level of competence to understand the relationship between the injury and his employment. Claimant testified that he went through the eleventh grade in school and obtained a GED in 1976. (Tr. 28). Also, Claimant was also familiar with the workers' compensation system having experience in protracted litigation over the 1980 injury to his heel and its subsequent aggravation in 1992. (Ex 10-22).

[5] In this regard, it does not matter whether or not Claimant's repetitive knee trauma is peculiar to Claimant's employment, and thus classified as an occupational disease, or is merely treated as a traumatic injury because, by the time Claimant filed suit on March 27, 2000, both limitation periods for giving notice had passed. *See Bunge Corp. v. Carlisile*, 227 F.3d 934, 938-39 (7th Cir. 2000)(finding that repetitive joystick work causing carpal tunnel syndrome was peculiar to employment an thus an occupational disease); *Leblanc v. Cooper/T. Stevedoring, Inc.*, 130 F.3d 157, 160-61 (5th Cir. 1997)(finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are treated as traumatic injuries); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177-78 (2nd Cir. 1989)(finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease).

Procedures Act, however, a claimant has the ultimate burden of persuasion by a preponderance of the evidence. *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 281 (1994). The Section 20(a) presumptions were left untouched by *Greenwich Colleries*. *Id* at 280. Thus, the Section 20(a) presumption applies in determining whether working conditions caused a claimant's injuries. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 118 (1995).

Before invoking the Section 20(a) presumption, a claimant must first establish a *prima facie* case by showing that he suffered some harm and that working conditions existed which could have caused the harm. *O'Kelly v. Dep't of the Army*, 34 BRBS 39, 40 (2000). This does not require a claimant "to introduce affirmative medical evidence that the working conditions in fact caused his harm . . . ." *Id*. (Citing *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 608 (1982)). Once a claimant has established a *prima facie* case, the employer/carrier must produce evidence that the claim does not fall under the provisions of the Act, and once defendant meets this burden the presumption dissolves and claimant is left with the ultimate burden of persuasion. *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999). Thus, the burden that shifts to the employer/carrier is the burden of production only. *Id*. at 817.

C(1) Establishing the Section 20(a) Presumption

Section 20 of the Longshore Act provides: "In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a) (2000). "To invoke this presumption a claimant must make out a *prima facie* case of causation by establishing both that he suffered harm and that workplace conditions or a workplace accident could have caused, aggravated or accelerated the harm." *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 64-65 (2nd Cir. 2001).

In the instant case, Claimant testified that the conditions of his employment required repetitive climbing, crawling, stooping, bending and grinding. (Tr. 35). Claimant further testified that he was required to crawl on two-by-ten boards. (Tr. 45). Rather than suffering from a sudden traumatic injury, Claimant's knee just wore out. (Tr. 50). Accordingly, Claimant has established that working conditions existed which could have caused the harm to his knee, and has established a *prima facie* case to invoke the presumption in Section 20(a).

C(2) Rebutting the Section 20(a) Presumption

Once the claimant has the benefit of the Section 20(a) presumption, the employer must then rebut the presumption of causation with substantial evidence. *Bath Iron Works Corp. v. Director*, OWCP, 109 F.2d 53, 56 (1st Cir. 1997). Substantial evidence is "such relevant evidence as a reasonable mind might

accept as adequate to support a conclusion." *Bath Iron Works v. Brown*, 194 F.3d 1, 5 (1st Cir. 1999)(quoting *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982)).

Here, Employer effectively rebutted the presumption of causation. Dr. MacAndrew, Claimant's treating physician, stated in a letter dated August 14, 2000, that Claimant's knee problem was not causally related to his work. Accordingly, Employer presented substantial evidence that Claimant's knee injury was not related to a work place accident.

C(3) Causation Based on Record as a Whole

Once the employer offers sufficient evidence to rebut the Section 20(a) presumption, the claimant must establish causation based on the record as a whole. *Brown*, 194 F.3d at 5. If, based on the record, the evidence is evenly balanced, then the employer must prevail. *Id*. *See also Greenwich Colleries*, 512 U.S. at 281.

In 1980 Claimant injured his heels by jumping off a lay-down at work. (Tr. 33). After this injury, and numerous subsequent surgeries, Claimant was placed on "light duty" within the structural welding department. (Tr. 35). Nevertheless, Claimant was asked to do activities that required climbing, crawling, stooping, bending and grinding. *Id*. In approximately 1986, Claimant's inability to effectively perform these tasks led to his moving into the Transportation Department where Claimant could avoid repetitive trauma to his knees. *Id*. Around 1989, Claimant moved into the heated pipe welding shop and this job did not require repetitive trauma to his knees. (Tr. 38). In 1993, Claimant worked as a structural welder in the high bay facility, a job that entailed repetitive knee trauma, and quit working in 1995. (Tr. 40-45).

As early as October of 1994, Claimant reported lower extremity pain. (EX 6). Claimant first saw Dr. MacAndrew, an orthopedic surgeon on November 2, 1995, in relation to knee pain. (EX 8). While undergoing treatment Claimant raised the issue of causation with Dr. MacAndrew, who stated that "anything is possible." (Tr. 66). In Dr. MacAndrew's deposition, counsel asked him to clarify that conversation:

A . . . . To that point we had gone through private insurance, and we were certainly well down the road at that point. And could it have been caused by work? It may have been, but I didn't have any history. I wasn't gonna get myself into a confrontational situation with the patient at that point over what I perceived as a non issue and to that point had never been related to me by the patient.

(MacAndrew Dep. 35).

Later when Employer's counsel squarely asked Dr. MacAndrew whether his injury was related to his job activities with Employer, Dr. MacAndrew stated:

> A You know, I have a whole problem with this because I don't have a history given to me by the patient. You know, if the guy is climbing 60 feet to do his job and forgets a tool and has to go down those stairs, 60 feet, I will tell you, my knees are gonna be hurting me. But that is not what I do, you know. But if he had to do it 25 times in a course of a day over 20 years or 10 years, yeah. I think he is gonna have more knee pain than the average guy who doesn't have to do that. . . . [T]he medical certainty is a foggy issue. I don't have an answer to that. . . . Maybe he had problems before he was doing this, and he was just lucky enough to get a job with a bad knee. . . .

(MacAndrew Dep. 41-42).

Acknowledging that there was no clear cut etiology of Claimant's knee injury, Dr. MacAndrew did state that Claimant's osteoarthritis was likely traumatic and not degenerative because Claimant's complaints were specifically directed to his right knee and not both knees. (MacAndrew Dep. 9). Then, based on a rough summary of Claimant's work history with Employer, Dr. MacAndrew stated that such working conditions would contribute to or aggravate the debilitation or function of Claimant's knee. (MacAndrew Dep. 12). Additionally, Claimant told Dr. MacAndrew that his knee pain had been ongoing for the past two years. (CX 2). Accordingly, I find that a preponderance of the evidence in the record supports the determination that there were employment conditions that could give rise to Claimant's knee injury, and that Claimant did sustain a work related injury to his knee.

D. Nature and Extent and Date of Maximum Medical Improvement.

Claimant seeks temporary total disability benefits from January 30, 1996 through November 7, 1996, medical benefits, and a scheduled award for Claimant's leg. Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional

approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

D(1) Date of Maximum Medical Improvement

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

Here I find that Claimant has a permanent disability and reached maximum medical improvement, after his last scheduled examination with Dr. MacAndrew, on November 7, 1996. (MacAndrew Dep. 16). At that time Claimant was no longer undergoing treatment with a view toward improvement, and subsequently held two temporary jobs before finding his present employment on January 15, 1997. (Tr. 53-54, 69-70). After November 7, 1996, Dr. MacAndrew testified that Claimant had a lower extremity impairment rating of thirty-seven percent as a result of the knee replacement in his right leg. (MacAndrew Dep. 14-15).

D(2) Prima Facie Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); *P&M Crane Co. V. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Claimant established a prima facie case of total disability because I find that he can no longer perform his former longshore employment as a structural welder in the High Bay facility. Claimant's former job entailed climbing inside, around and on top of cylinders, at heights of up to sixty feet, using ladders and crawling on two-by-ten boards. (Tr. 40, 43-45). Claimant testified that after having a total knee replacement he could not climb a ladder. (Tr. 46). Likewise, Dr. MacAndrew stated that generally he would not recommend such heavy physical work after having a total knee replacement. (MacAndrew Dep. 37-38). Dr. MacAndrew also told Claimant that it was inappropriate for him to be on ladders. *Id*. at 10-11. Furthermore, Claimant was already laid-off by the time he reached maximum medical improvement and Employer did not offer to make Claimant's former job available.

D(3) Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Vessel Repair, Inc.*, 168 F.3d at 194 (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job).

Here, Employer did not attempt to make Claimant's former job available to him. Indeed, when Claimant first had an injury to his knee diagnosed by Dr. MacAndrew, Claimant had been laid off five months. After Claimant was laid off on June 10, 1995, Employer demonstrated, through Cherie King, a vocational expert, that Claimant could obtain suitable alternative employment, and that there were no earning losses after January 1, 1997. (EX 24). Claimant first obtained his present job on January 15, 1997, earning eleven dollars and hour, and by the time of the formal hearing, Claimant was earning seventeen dollars an hour. (Tr. 72). In Claimant's post-hearing brief, however, Claimant asserted that he is only seeking scheduled benefits, and temporary total disability benefits from January 30, 1996, the date of Claimant's first surgery to his right knee, up to November 7, 1996, the date of maximum medical improvement, and not an award for temporary partial disability benefits.[6] Accordingly, I find that Claimant is entitled to temporary total disability from January 30, 1996 to November 7, 1996, and find that Claimant has reached maximum medical improvement with a lingering disability entitling him to scheduled benefits under the Act as of November 8, 1996.

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[6] In this regard I note that Claimant had requested temporary partial disability benefits from November 8, 1996 to July 25, 2000 in his LS-18 pre-hearing statement.

E. Section 3(e) Credits

In the Case of *D'Errico v. General Dynamics Corp.*, 996 F.2d 503 (1st Cir. 1993), the court determined that amounts recovered under Rhode Island's Workers' Compensation Act for loss of use and disfigurements should be credited against recovery under the LHWCA. D'Errico, the injured employee, suffered a single workplace accident necessitating the amputation of part of his foot. *Id*. at 504. Under state law D'Errico recovered benefits for loss of use and disfigurement. *Id*. In a subsequent LHWCA claim, in which he was awarded permanent total disability, D'Errico argued that Section 3(e) did not apply because "total disability" under the Act constituted a different disability than "loss of use" or "disfigurement." *Id*. at 505. The First Circuit, however, determined that the "same injury, disability or death" language in Section 3(e) referred to the same physical injury, and not to separate effects of the same physical injury. *Id*. Thus, even thought there were different categories of compensation, D'Errico only suffered from one injury and the employer was entitled to Section 3(e) credits. *Id*.

The instant case is clearly distinguishable from *D'Errico*. In 1980 Claimant injured his heels after jumping off a lay-down at work. (Tr. 33, 39). Employer's records indicate that two payments were made to Claimant on November 22, 1983 under the Rhode Island's Workers' Compensation Act for the right lower extremity. (E. Post-Hearing Br. at 19). Claimant received payments for loss of use of $3,931.20, and disfigurement benefits of $4,500.00. (EX 12). After a subsequent aggravation in 1992, Employer paid an additional $7,558.97 in permanent partial disability for the feet based off a five percent impairment for each foot. (EX 17). After Claimant was laid off in 1995, Claimant finally settled the 1980 heel injuries for $80,000.00, with a net payable to Claimant of $68,000.00.[7] (EX 18,19). Under the laws of Rhode Island, the compensation payment was made for the right lower extremity. *See* R.I. GEN LAWS § 28-33-19 (1995). Claimant's settlement agreement included future disability. (EX 18). At the hearing, Employer workers' compensation specialist, Jeanne McDonagh, testified that the term lower extremity encompasses the whole leg and not just the foot. (Tr. 90). Thus, all previous payments arose from the 1980 and 1992 injuries to Claimant's heels. The current claim relates to a separate injury to Claimant's knee. Thus, under the rationale in *D'Errico* they are not the same injury or disability. Accordingly, Employer is not entitled to a Section 3(e) credit for Claimant knee injury.

[7] A different set of settlement documents was submitted to the Workers' Compensation Court in Rhode Island for $39,000.00 with a net payable to Claimant of $33,150.00. (EX 21,22). Counsel for Employer stated that it is unknown why there is a difference in amounts, but $68,000.00 was indeed paid to Claimant as reflected by the settlement check, (EX 19), and Claimant's testimony. (Tr. 68).

IV. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

Claimant's petition for benefits under the Act is **DENIED** for failure to timely file a claim under Section 13 of the Act.[8]

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CLEMENT J. KENNINGTON

Administrative Law Judge

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[8] Should the Board see fit to overturn this decision, I make the following alternative order:

1. Employer shall pay to Claimant total disability compensation pursuant to Section 908(b) of the Act for the period of January 30, 1996 to November 7, 1996, based on a weekly compensation rate of $389.99.

2. Employer shall pay to Claimant scheduled benefits pursuant to Section 908(c) of the Act based on a thirty-seven percent impairment to the right knee, or $41, 557.33 (288 weeks x 389.99 compensation rate x 37% impairment), commencing November 8, 1996.

3. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.